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FOREIGN VENTURES

By Steve Revay, President of RAL

More and more Canadian design consultants, contractors, manufacturers and other members of the construction sector are engaging in offshore work. Others are contemplating doing so in response to depressed domestic markets and to Government urgings. Also, Owners are initiating overseas projects from time to time.

Those who venture into the export field now or in the future should remember that the litigation procedures related to contract disputes are often far different from those which operate in Canada and the United States. Accordingly, it is vital that this matter receives full attention before entering into a contract.

In this issue two overviews are provided. Firstly, lawyer Neil McKelvey, QC describes the differences concerning the procedures related to the litigation of contract disputes abroad and concludes that it is preferable to include a suitable arbitration provision in contracts. Secondly, our Calgary Manager, Tom Watts, deals with the various international arbitration bodies and factors which should be considered in the preparation of such an arbitration clause.

Mr. McKelvey is very experienced in construction cases and is, moreover, a past president of the International Bar Association (197880) as well as the Canadian Bar Association (197374). Tom Watts, as you will see in his profile, has had considerable seasoning with international arbitration cases. I commend their articles to you for both current reading and future reference.

FACTORS FAVOURING ARBITRATION ON OVERSEAS PROJECTS

By E. Neil McKelvey, Q. C. of McKelvey, Macaulay and Machum, Saint John

In domestic contracting there are some situations best suited to arbitration and some best suited to litigation. In the case of international dealings, there is much less choice when it comes to the question of a suitable forum; in most cases arbitration is the better alternative.

In the realm of private dealings of an international nature, even though one party may be a national government, there is no international forum where one may, as of right, take a dispute. National courts have no international jurisdiction but a foreign company may sue or be sued in a national court and there are means of enforcing the judgement of the courts of one nation through the taking of a judgement in the courts of another nation where the judgement debtor has assets.

It is not unusual to see reference to international law or the World Court, which may raise the hopes of anyone dealing in the international marketplace. The first of these terms, however, is misleading, particularly in the realm of contracts. International law deals primarily with relations between nations and in a limited number of situations with the rights of citizens of one nation in the territory of another. It does not deal with international disputes between private parties. Reference to the World Court may also give false ideas. This Court, correctly named The International Court of Justice, is a United Nations body; its jurisdiction is not over private parties, but over controversies between nations. A nation may sometimes take the case of its citizens before the International Court but such occasions are rare and involve some national interest on the part of the nation concerned. It is most unlikely to happen for a construction contract matter; such private disputes do not come before that court.

We are left then with the simple fact that there is no international court system, but only national systems.

One may think that the national systems will be sufficient for cases involving an international element. However, it is important to consider the variations between legal systems and the problems that may be faced. There are two basic systems of law which cover most nations, the common law procedures where the parties to the dispute each present their cases and the court acts in a passive role to decide the result

based on the decisions from prior cases and the civil law procedures where the court itself determines the issues, gathers the evidence and decides the case based on written codes.
In general, nations having their legal origins in England will follow common law procedures while those with their origins in the continental European nations will follow civil law procedures. Exceptions to the above rules are Quebec and Louisiana, which have a civil law system but follow common law procedures. A distinction must be made for middle eastern countries where Islamic law strongly influences the legal systems.

All of this gives the appearance of being a reasonably comfortable situation which can be dealt with. However, what is significant is that the method of approaching contract disputes and the court proceedings in another nation may be completely unfamiliar to the North American firm. Under the common law system, such as we have in North America, the courts apply the terms of the contract to decide the rights of the parties on the theory that their function is only to hold the parties to the bargain they have made for themselves; courts do not rewrite the contract. The procedure is an adversary system under which each party presents its case in its own way and the court adopts a passive role.

In the civil law system, the courts depart from the contract terms to impose a solution which the courts consider just; they in effect rewrite the contract. The procedure is an inquisitorial system; the court takes its own evidence and makes its own investigation, having regard to the dispute as outlined by the parties. This procedure can be very frustrating to a contractor or owner used to the North American procedures where the contract governs and the parties present their own cases.

To this lack of familiarity must be added at least **three** further items **first,** the law of most countries requires that cases be conducted in the official language and this can mean that every piece of documentation must be translated into that language irrespective of the language which may have been used during the project; **second,** an unbiased judgement may be difficult and indeed impossible to obtain in a few jurisdictions; **third,** the problem of the enforcement of the judgement, i.e. not only will it be enforced, but also, can it be enforced.

The majority, if not all, of the problems with foreign litigation can be avoided if a suitably worded arbitration agreement is included in the contract. Arbitration is only available when the parties have agreed to submit to it; obviously the time to reach such an agreement is when the contract is made, it may be too late after a dispute has developed. Such a clause will ensure the availability of a satisfactory forum. The place of the arbitration is particularly important as the law and procedure of that location will likely be applied; unwittingly a North American may find himself locked into an unfamiliar civil law (or even Islamic law) jurisdiction. Also, the language and rules of the proceedings may also be predetermined and, moreover, there is a good probability of enforcement of an award. Careful preparation of the arbitration clause is essential; far more critical than in the case of a domestic contract.

Thus, one of the keys to satisfactory international arbitration is the wording of the clause and the selection of the type and location of the arbitration. The considerations are far more involved than those in a domestic contract and, for this reason, it is wise to look to one of the bodies which deals with arbitrations of international contracts. The following article by Tom Waits outlines some of the alternatives available.

INTERNATIONAL ARBITRATION RECOMMENDED PROVISIONS

By T.J. Watts

There are several organizations dealing with the arbitration of disputes, each of which differs to some degree as to its rules and jurisdiction. Probably the best known body**,** and indeed that which handles the majority of construction cases, is the Court of Arbitration of the International Chamber of Commerce (ICC). Despite its name, the ICC is not a court, but an overseeing body.

Also among those providing for international arbitration are the London Court of Arbitration (LCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute), the American Arbitration Association (AAA), the United Nations through the Permanent Court of Arbitration which administers Arbitration Rules of the United Nations Commission in International Trade Law (UNCITRAL) and the World Bank through the International Centre for Settlement of Investment Disputes (ICSID). The latter body limits its jurisdiction to situations which involve World Bank financing. It is noted that, despite their names, none of these is a court in the normal sense of the word.

There are two common elements to the arbitration rules of all these organizations. The first is that none of them settles the dispute itself and the second is that there is almost limitless flexibility providing the parties to the dispute have mutual agreement.

The latter element is reason to appraise seriously the arbitration requirement of a contract prior to

signing. Items such as location, language and applicable law can make a difference to the outcome of an arbitration and obviously a mutual agreement as to these is far more likely during contract negotiation than during a dispute.

In the event of the clause being silent as to some basic aspects of the arbitration, the rules of the various organizations allow either that the organization itself makes a decision or the arbitrators are given that power.

Particular basic aspects are the appointment of the arbitrators themselves and the location of the arbitration. In regard to appointment, if the parties are unable to agree on arbitrators, then with the exception of UNCITRAL, the institution will appoint them. In the case of UNCITRAL, an "appointing authority" is designated and this authority (it may be a person or organization) will, in turn, proceed to arrange for the appointment of arbitrators. It is probable that arbitrators appointed due to lack of mutual consent will be of a third country nationality. The AAA requires that this be the case upon request of either party; however, rules of other bodies are generally limited to a statement such as "nationality shall be taken into account".

In regard to location, in the case of ICC and AAA rules, if there is dispute then those organizations will decide. For other organizations, the arbitrators themselves are given the power to establish location.

Concerning location, two aspects of law must be addressed. These are (i) **"Procedural Law"** which is the rules defining the form of litigation and, most importantly, facilitating the enforceability of awards and (ii) **"Substantive Law"** which is the rules determining the respective rights and obligations of the parties, including whether or not the award is binding.

To a large degree, the substantive law to be applied to arbitration will be defined by the contract or by the rules of an administering agency; however, this is less likely for procedural law. On the other hand, if there is no procedural law specified, the arbitrators will probably look to that of the country in which the proceedings (not the work) takes place.

It is apparent then that although it appears to be simply a matter of logistics, the locale of proceedings has a more far-reaching effect. Because of the differing national legal systems, there are marked differences between procedural laws of various countries.

It is appropriate also to make mention of the allowance of arbitrators to act in accordance with "natural justice" and "fundamental fairness", or as so-called "amiable compositeurs". In some countries, this power is automatically conferred upon arbitrators unless it is specifically prohibited by the arbitration agreement. On the other hand, it is possible to give the arbitrators this power.

As to other powers of the arbitral organizations themselves, perhaps the most important is the actual administration of the arbitration. With the exception of UNCITRAL each of the organizations providing the rules for arbitration also provide for administration of the arbitration, although this administration is somewhat limited. In the case of ICC, there is provision for them to approve both the Terms of Reference (a delineation of the matters to be decided) and the award for compliance with those Terms of Reference.

The final consideration in any international arbitration is that of enforcement of the award. This may be governed the Convention of Recognition and Enforcement of Foreign Arbitral Awards, sometimes called the New York Convention. This convention is a United Nations agreement which has been ratified by more than 50 nations. The essence of the convention is contained in the following extracts from Articles II and Ill of the text:

"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration"

and

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon ..."

The signatories to this convention include the United States, U.S.S.R., U.K. and most continental European countries. There is a dearth of signatories among both Latin American and Middle East countries. Additionally it should be realized that Canada is not a signatory to this Agreement, which could be an important hurdle with regard to countries whose agreement is conditional on reciprocity.

One of the qualifications allowed in ratifying the convention is for states to declare that they will be bound by the convention only if the second state is also bound. This reservation has been made by more than half of the signatories.

The question then arises as to methods of enforcement if the New York Convention is not available. The answer to this question will depend on the wording of the arbitration clause itself and on the attitude of the nation where enforcement is required.

The clause should contain a requirement that the award may be enforced as a judgement. The recommended clauses of some of the arbitral institutions include such words and, of others, the rules themselves contain the agreement as to finality of the award. With such a qualification to the arbitration clause, the courts will enforce the award because they will simply be addressing the fact that there was an agreement to be bound. It is noted that in such situations the court will not likely be looking to the merits of the case or the award itself, but merely to the agreement to be bound. This result may of course be different depending on the peculiarity of the national court in question.

It has been stated above that a suitable arbitration clause should be negotiated into international contracts.

It is appropriate to note, however, that in the case of Saudi Arabia, Ministers and agencies of the Government are prohibited from entering into agreements to arbitrate. There is, however, a Grievance Board which will hear complaints. This Board will usually refer technical issues to technical experts and as a general statement, it may be said that an award which is equitable but complies with Islamic law principles will result.

In regard to Saudi Arabia, it is also notable that the United States Army Corps of Engineers is handling a great deal of construction on behalf of the local Government and that the Corps dispute settlement procedures are available for contracts performed under their auspices.

In summary, arbitration may be the only practical way to proceed in the resolution of international construction disputes and, with this in mind, it will be wise to consider the inclusion of an arbitration clause in the original agreement. The issues of rules, language, location and enforceability should be addressed when establishing the clause. Reference to rules of one of the international bodies, particularly the ICC or UNCITRAL, will be most likely to provide for a minimum of problems.

CT4 DEBUT

The CT4 computerised Labour Management System specifically designed for Contractors was demonstrated at the recent Annual Conference in Halifax of the Mechanical Contractors Association of Canada. The system, developed by Revay Management Systems Inc., supports key construction management activities such as Estimating/ Budgeting, Planning, Scheduling and Cost/Productivity Control, all on a fully integrated basis.

T.J. Watts

Calgary Branch Manager Tom Watts joined Revay and Associates Limited at the beginning of 1980 and has been heading up the company's Western operations since that time.

Those operations have covered a wide spectrum of RAL's sphere of expertise including productivity studies, job audits, scheduling assignments, seminars and, of course, construction claims work.

Tom's professional experience commenced in his native Australia where he graduated in Engineering in 1968. Following graduation, he was employed as a structural designer and specification writer by a firm of consulting engineers. Subsequently, he served in the Australian Army, including a tour of duty in South Vietnam. During that period, he was involved with Engineering aspects of construction for both military and civil facilities under what he describes as "sornewhat unusual conditions". This was the commencement of his work in the international field.

Upon discharge, he joined the international division of U.S. construction company, Morrison Knudsen, and spent the balance of his pre-RAL career with them. He was employed in various capacities on heavy construction projects in New Guinea, Australia and Asia. His last assignment was in the Contract Administration department in the Morrison Knudsen head office.

Since joining Revay and Associates Limited, Tom's activities have been more domesticated in Canada; however, he continues to be involved in international assignments for RAL.

Productivity What Does It Mean?

"Although much more is known about productivity than was the case even five years ago, if for no other reason but because more and more is heard about lack of productivity, nevertheless the confusion surrounding the definition of the word is still with us."

"Productivity to an economist is the ratio of input, e.g. labour hours, to the added value generated in the process, while to the practitioners of

the construction industry it is the relative efficiency with which a tradesman does what he is supposed to do at a given time and place."

"Maybe the industry should be talking about efficiency and should leave the word productivity for the economists to toil with. In any case it is just about time that the construction fraternity to grips with this issue."

"Even more importantly, however, it is time that the industry establishes standards to measure productivity or more precisely to measure the cause and effect relationships between productivity variations and motivators or demotivators."

"Many people are talking about certain practices as causes giving rise to loss of productivity or others acting as motivators, but there is little or no agreement on the method of quantification."

"Without knowing the real effect (e.g. in improving or reducing productivity) of a given industrial practice, one is hard pressed to determine whether and under what circumstances can such a practice be justified."

Excerpts from Steve Revay's address to the Industrial Contractors' Section of the Canadian Construction Association held during the C.C.A. Summer Meeting in Halifax.

Technology Alert

"In general, Builders and Contractors have not been too concerned over the years about such matters as productivity levels or "Technology Transfer so long as they are competitive with their peers. That is especially so in a rising market. In a shrinking market, however, it is not acceptable."

"In today's extremely tight housing market situation, a better awareness of modern technology can be a way of distinguishing your homes from the competition's homes and/or keeping your costs down. Either way, technology transfer may make the difference in your ability to market your product profitably. And in terms of business survival, that is the bottom line."

"It is significant that under the Housing Warranty Program, virtually every case of a claim relates to a failure to apply widely known technology. High costs are not only due to high interest rates which affect the Owners the costs incurred by the Builders themselves are reflected in their sales and rental figures, not forgetting avoidable call back costs to cope with complaints."

"In summary, greater and more effective use of Technology Transfer is the main vehicle for restraint of the Builder's own costs and the maintenance of his competitive edge."

Excerpts from the keynote address at Technology Transfer session of the 1982 Annual Conference of the Housing and Urban Development Association of Canada by RAL Ottawa Bureau Chief Don Chutter.

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